BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY L. BOYER	)	
Claimant	)	
VS.	)	
	)	Docket No. 228,897
BINNEY & SMITH, INC.	)	
Respondent	)	
AND	)	
	)	
ROYAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Brad E. Avery on March 22, 1999. The Appeals Board heard oral argument September 1, 1999.

APPEARANCES

Orvel Mason of Arkansas City, Kansas, appeared on behalf of claimant. John D. Jurcyk of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant is permanently and totally disabled as a result of a back injury that aggravated a prior injury. The ALJ then denied respondent's request that monies paid by respondent under a severance package be offset against benefits awarded. But the ALJ agreed that because of the maximum benefits limits in K.S.A. 44-510f, the monies respondent paid for a prior work-related injury should be credited against the maximum of $125,000 allowed for permanent total disability in this claim.

On appeal, claimant contends the ALJ erred when he granted the credit for amounts paid for the earlier back injury. Claimant also contends, as a part of this argument, that the

current injury is not an aggravation of a previous injury but is, instead, a new and distinct injury.

Respondent, on the other hand, argues claimant is not permanently and totally disabled and failed to make a good faith effort to find employment. Respondent also contends that it should receive a credit for amounts it previously paid claimant for a work-related back injury and asserts that it is entitled to credit for monies paid claimant under the severance agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. The Board agrees that claimant has a permanent total disability and that the severance payments should not be deducted. The Board disagrees with the straight deduction of prior benefits from the maximum payment of $125,000, but in the alternative concludes the Award should be reduced under K.S.A. 1999 Supp. 44-501(c) to account for a 20 percent preexisting disability.

Findings of Fact

1. Claimant began working for respondent in January 1988 and for most of the time before his accidental injury on February 11, 1997, worked as a materials handler.

2. On February 11, 1997, claimant injured his back when he slipped on the stairs at work. Claimant caught himself on the handrail before falling down but twisted his back as he did so.

3. Claimant went first to Dr. Wade Turner. Dr. Turner referred claimant to Dr. Paul S. Stein who recommended an MRI be done. Claimant also saw Dr. Rodney Jones, Dr. Pedro A. Murati, Dr. Phillip R. Mills, and Dr. Robert L. Eyster.

4. Dr. Stein had, before the accident of February 11, 1997, performed two surgeries on claimant's back.

5. Claimant first injured his back in 1981 while working for Rodeo Meats. Following this injury, claimant underwent surgery by Dr. Martin. Claimant injured his back again in 1989 and again in 1994. Both the 1989 and the 1994 injuries were while working for respondent and on both occasions claimant had surgery by Dr. Stein.

6. Claimant settled a workers compensation claim for the 1981 injury, the injury that occurred while working for Rodeo Meats, for $19,547.26 in temporary total and permanent partial disability benefits. The settlement was based on a 10 percent general body disability.

For the injury in 1989, an injury that occurred while working for respondent, claimant received temporary total disability benefits and an additional $17,220.15 in permanent partial disability benefits.

For the 1994 injury, also an injury that occurred while working for respondent, claimant received $5,104 in temporary total disability benefits and $9,244.62 in permanent partial disability benefits.

7. The surgery Dr. Stein performed on claimant in 1989 was for recurrent disc herniation on the left side between the L5 and S1. This was the same area of the back where claimant had surgery in 1981. Dr. Stein gave claimant an impairment rating at this time and recommended claimant use caution when lifting. Dr. Stein did not recommend specific restrictions.

Dr. Stein saw claimant again in 1994 for an injury that occurred on September 23, 1994, also while working for respondent. In December 1994, Dr. Stein did a second surgery to re-explore the same area of claimant's back to determine if there was further rupture of the disc. Dr. Stein extended the laminectomy and did a wide decompression of the nerve root. Dr. Stein found scar tissue and some bulging but not a true rupture. Following this surgery, Dr. Stein recommended restrictions: he recommended claimant not lift more than 30 pounds, nor bend or twist more than halfway, and sit, stand, or walk for no more than two hours at a time with ten-minute breaks. Dr. Stein did not have specific recollection about whether these restrictions were to be considered permanent. Claimant testified he was not given permanent restrictions after either the 1989 or the 1994 surgeries.

Dr. Stein also saw claimant after the current injury. Dr. Stein recommended EMG and MRI studies. The EMG was negative. The MRI revealed scar tissue but nothing that could be defined as a ruptured disc, and Dr. Stein did not recommend additional surgery.

When asked for an opinion on the cause of the symptoms claimant experienced after the 1997 injury, Dr. Stein stated it was possible that claimant stretched a nerve and irritated some of the scar tissue but he could not tell with certainty.

8. Dr. Stein rated claimant's permanent impairment after the 1997 injury. He testified that in his opinion claimant has a 25 percent impairment to the whole person. He further testified that a 20 percent impairment existed after the 1994 surgery and the 1997 injury resulted in the additional 5 percent impairment to give the total 25 percent.

9. When asked if the 1997 accident aggravated a preexisting condition, Dr. Stein testified: "I suspect that that's the case."

10. After the 1997 injury, respondent could not accommodate claimant's restrictions and claimant has not returned to work for respondent or any other employer.

11. Respondent ceased operation of its Arkansas City facility in 1997, and claimant entered a separation agreement effective October 3, 1997. Pursuant to that agreement, claimant received 15 ½ days for accrued and unused vacation and personal leave time. Claimant also received 1 ½ weeks of severance pay for each year of employment. Pursuant to the agreement, respondent also continued to provide medical insurance for six months. In exchange, claimant released respondent from any possible claims other than workers compensation claims, agreed not to disclose confidential information, and agreed not to retain any business records of respondent.

12. Dr. Murati examined claimant on October 27, 1997, at respondent's request. Dr. Murati diagnosed failed back surgery syndrome and lumbosacral strain. Dr. Murati also concluded claimant has a herniated disc at L5-S1. Dr. Murati agreed with previous suggestion by Dr. Jones that claimant undergo myeloscopy, a procedure performed with an arthroscope to take away scar tissue and dislodge the nerve root.

Dr. Murati recommended claimant follow the restrictions from his functional capacity evaluation. In general, Dr. Murati stated claimant would be limited to sedentary/light level of work.

Dr. Murati gave a task loss opinion but also testified that claimant was going to have a very hard time finding a job. Dr. Murati testified he could not think of a job claimant could perform. He also described claimant as the type of patient he would tell to go to SRS and obtain disability forms.

When asked if the incident of February 1997 was an aggravation of the claimant's preexisting condition, Dr. Murati opined that the injury of 1997 probably would not have happened but for the preexisting surgeries. He said it was not really an aggravation but it was a recurrence. Dr. Murati believed that claimant herniated a disc on February 11, 1997, when he slipped on the stairs at work.

13. Claimant saw Dr. Mills on November 26, 1997, at the request of respondent's counsel. Dr. Mills also diagnosed failed back syndrome secondary to scarring. He rated the impairment as 25 percent of the whole person and attributed 15 percent to prior injury. He opined that claimant should be limited to sedentary work activities and should be able to change positions after 30 minutes of sitting. Dr. Mills also gave a task loss opinion but also testified that in his opinion claimant was not realistically and practically able to work in a competitive job market.

Dr. Mills testified that the third incident, the incident involved in this claim, was more probably than not an aggravation of the condition that existed after the first two surgeries. He believed the most likely mechanism was a tear of the scar tissue that made claimant's back symptomatic.

14. Based on the opinion of Dr. Stein, the physician who performed two of the surgeries, the Board finds claimant had an impairment of 20 percent of the whole person before the 1997 injury.

15. Ms. Karen C. Terrill prepared a list of the tasks claimant performed during the fifteen years before the February 11, 1997 accident. According to Ms. Terrill, claimant would be able to find employment at $6.50 per hour. Ms. Terrill recommended claimant start by checking with Adecco.

16. Mr. James T. Molski testified it would be extremely difficult for claimant to find employment.

17. Based on the opinion of Dr. Mills, as supported by testimony of vocational expert Mr. Molski and the medical opinion of Dr. Murati, the Board finds claimant is realistically unemployable.

Conclusions of Law

1. The Board concludes claimant is permanently and totally disabled. *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

2. The Board agrees with and affirms the decision by the ALJ to deny respondent's request for an offset of monies paid claimant pursuant to the severance agreement. Respondent argues these monies are the equivalent of retirement and an offset should be made under K.S.A. 1999 Supp. 44-501(h). In the alternative, respondent contends the Board could find that the monies should be treated as voluntary payment of unearned wages under K.S.A. 44-510f(b). The Board concludes the monies should not be treated as either retirement or unearned wages. The severance money was paid for business reasons including, according to the agreement, claimant's release of any claims against respondent. The money was neither a retirement benefit nor an unearned wage. Absent express statutory mandate to the contrary, the employer is not entitled to credit for payments to claimant under a legal obligation outside the Workers Compensation Act. *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732. P.2d 808 (1987).

3. The Board disagrees with and reverses the decision of the ALJ to offset amounts respondent paid under the previous settlements. The statute at issue, K.S.A. 44-510f states:

> Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

> (1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, $125,000 for an injury or any aggravation thereof; . . . .(*Emphasis added*.)

Respondent argues that claimant has, in this case, suffered an aggravation of a prior injury and asserts that the limit for the initial injury and any aggravation of that injury is $125,000. The ALJ agreed and subtracted in excess of $51,000 the respondent had paid for the 1989 and 1994 injuries.

The Board has reached a different conclusion for two reasons. First, the Board does not construe the statute as respondent urges. The Board understands the statute to mean that a claimant may not receive more than $125,000 for an injury and may not receive more than $125,000 for an aggravation of an injury. In either case, the limit is the same. This conclusion is, we believe, supported by case law holding that an aggravation of a preexisting condition is fully compensable. *Poehlman v. Leydig*, 194 Kan. 649, 400 P.2d 724 (1965); *Baxter v. L. T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987). The Board also considers the language of the statute to be supportive of this conclusion. The statute could have clearly limited the total amount for injury to a single part of the body by stating that the limit applies to any injury including any aggravation of that initial injury or could have stated that the limit applies to an injury and the aggravation of that injury. By using "or" the legislature suggested that the limit applies to either an injury or an aggravation of an injury. The Board also notes, as further support for its reading of this statute, that reduction for prior injury is expressly governed by K.S.A. 44-501(c) and 44-510a.

Second, if the term "aggravation" is intended in K.S.A. 44-510f as a limit on the total award from the initial injury and any aggravation of that injury, the Board does not consider claimant's injury to be an aggravation. If the term "aggravation" is there limiting the total for both the injury and the aggravation, the Board believes the term "aggravation" should be construed as further injury that is the direct and natural consequence of the first injury, not injury from new and distinct trauma. This distinction is made in *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. App. 800 (1982) to determine whether the second injury could be the subject of a liability claim. In the second accident claimant slipped, caught himself, and broke the fusion for the initial compensable injury. The Court there held:

> Where a separate and distinct injury (which the worker alleges was caused by his former employer's negligence) occurs after an initial injury compensable under the workmen's compensation act has completely healed, and where the employee is no longer employed by the employer originally liable for the workmen's compensation payments, such former employee may bring an action in tort against such employer. (*Syl.*)

The same distinction is appropriate here. Where there has been a second separate and distinct injury, the claimant may recover up to the $125,000 limit and the amounts paid on the first injury are not offset even if that second injury is to the same part of body.

4. Respondent is not, in this case, entitled to credit under K.S.A. 44-510a. Section 44-510a provides for a reduction in benefits where the second injury aggravates a prior compensable injury and where benefits paid for a prior injury overlap with the benefits to be paid for the second injury. This statute does not apply here because the benefits paid on the prior injuries would have run out before benefits became due on the current injury.

5. The Board concludes respondent is entitled to reduce the award for the 20 percent preexisting impairment. K.S.A. 44-501(c) provides:

> Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Board has held that these provisions apply to a permanent total award. *Horton v. Bob's Super Saver Country Mart and Cadwell's Country Mart*, WCAB Docket Nos. 220,167 & 220,168 (April 1999). The deduction is accomplished by calculating the number of weeks of benefits to be paid for the temporary and permanent total disability and then reducing that number by the number of weeks that would be paid for the preexisting disability. In this case, the temporary and permanent total disability award would call for weekly payments of $338 for 369.82 weeks. The preexisting 20 percent would call for 83 weeks at that same rate, $338 per week. The 83 weeks should be deducted from the 369.82 to arrive at an award of 286.82 weeks at $338 per week for a total award of $96,945.16.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery on March 22, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terry L. Boyer, and against the respondent, Binney & Smith, Inc., and its insurance carrier, Royal Insurance Company, for an accidental injury which occurred February 11, 1997, and based upon an average weekly wage of $682.72, for 286.82 weeks at $338 per week, or $96,945.16, of temporary total disability and permanent total disability combined.

As of May 31, 2000, there is due and owing claimant 38 weeks of temporary total disability compensation at the rate of $338 per week or $12,844, followed by 134.14 weeks of permanent total disability compensation at the rate of $338 per week in the sum of $45,339.32, for a total of $58,183.32, which is ordered paid in one lump sum less any

amounts previously paid. The remaining balance of $38,761.84 is to be paid for 114.68 weeks at the rate of $338 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel Mason, Arkansas City, KS
John D. Jurcyk, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director